1961

Ace S. Raymond v. Iver L. Larsen, Cache County Clerk and Auditor : Appellant's Brief

In the Supreme Court of the State of Utah

ACE S. RAYMOND,
Plaintiff and Respondent,

—vs.—

IVER L. LARSEN, Cache County Clerk and Auditor.
Defendant and Appellant.

Case No. 9404

APPELLANT'S BRIEF

Appeal from the First Judicial District Court
in and for Cache County, State of Utah.

Honorable Lewis Jones, Judge

ZACHARY T. CHAMPLIN
Cache County Attorney
DAVID R. DAINES
District Attorney for First
Judicial District.
Attorneys for Appellant

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ACE S. RAYMOND,
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—vs.—

EVER L. LARSEN, Cache County Clerk and Auditor,
Defendant and Appellant.

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BRIEF OF APPELLANT

This matter arose out of the refusal of the Cache County Clerk and Auditor, the appellant herein, to administer the oath of office to the respondent, Ace S. Raymond, who had been duly elected and certified the Commissioner of Cache County, State of Utah, at the General Election of November 8, 1960.

THE FACTS

All parties are residents of Cache County, Utah, and the appellant is the duly elected, qualified and acting Clerk and Auditor of Cache County, State of Utah.

That at the general election held in Cache County on November 8, 1960, the plaintiff and respondent was

elected by a majority of the votes cast in said
to the office of County Commissioner for a
term, and a certificate of election has been
to the respondent by the appellant as required

That the respondent for several years has
gaged in the general contracting business in Cach
ty, Utah and since his election has placed a bid
Board of Education, Cache County School Distr
the construction of a school building at Smi
Cache County, Utah. That on the 21st day of
ber, 1960, said respondent herein was declared to
low bidder for the construction of said building an
entered into a contract in writing with said school
to construct the said building and has commenced
construction thereof.

That the respondent is not a member of the S
Board of the Cache County School District and is
related to any member of the School Board. The
respondent took no part in the actions of the S
Board in employing an architect or in preparation
plans and specifications for the building or in calli
bids for the building. That the respondent plac
sealed bid with ten other bidders, which bids were
ed in public and by the School Board, and the resp
was declared to be the lowest bidder for the constru
of the said school and was awarded the contract a
bidder.

That the said contract provides for the construction of said building in accordance with the plans and specifications therefor under the supervision of the architect and the Board of Education. That the respondent expects to make a profit out of said contract.

That the respondent claims the right to continue his general contracting business and to bid on other public buildings to be constructed by school districts, the State of Utah or other public agencies, and municipalities while serving as a member of the Board of County Commissioners, but that he will not bid nor become interested directly or indirectly in any contract made by the Board of County Commissioners of Cache County or any person on behalf of the County for any purpose whatsoever, or by any public entity under the control or supervision of the Board of County Commissioners. The appellant admits that respondent claims the rights set forth herein, but does not admit that respondent has such rights while he is serving or would be serving as a member of the Board of County Commissioners of Cache County.

That the respondent presented himself to take the oath of office as County Commissioner of Cache County, Utah, on January 3, 1961, for a two year term and that the appellant refused to permit the respondent to take the oath of office or to qualify as such commissioner or to administer the oath of office to respondent and asserted that respondent had forfeited his right to act as such

commissioner by reason of entering into the co
aforesaid and by claiming the right to enter into
contracts with other state or public agencies of
Cache County in the future while holding the
County Commissioner. That the appellant assig
his reason for refusal to permit respondent to
or to be entitled to the benefits and emoluments
office of County Commissioner, the provisions o
XIII, Section 8, of the Utah Constitution and s
76-28-61 and 17-5-10 of the Utah Code Annotated.

The above facts were stipulated to between th
ties for purposes of the trial of this cause in the D
Court of Cache County, and the trial Court adopte
stipulation of facts for its Findings of Fact.

The Court then announced its decision that re
spondent, Ace S. Raymond, is the duly elected
Commissioner of Cache County, Utah, for a te
two years, beginning January 3, 1961, and has the
to qualify as such Commissioner and has a right t
privileges, duties and emoluments of the said offic
the appellant was directed to permit him to quali
serve as such officer, and the Court further said in
of Declaratory Judgment:

> "That the Contract made by the said
> tiff with the Board of Education Cache
> School District to construct a high scho
> ing, dated December 21, 1960, nor his anti
> that he will make a profit therefrom nor
> nounced intention to enter other similar co

[illegible] the State of Utah, Municipal [illegible] and other separate entities from [illegible] Counties, but not with the Board of County [illegible] Commissioners of Cache County, or any person [illegible] of Cache County for any purpose whatsoever, or any public entity under the control or [illegible] supervision of the Board of County Commissioners of Cache County while serving as a member [illegible] Board of County Commissioners, does not constitute a violation of the provisions of Article XIII, Section 8, of the Constitution of the State of Utah or Section 76-28-61 or Section 17-5-10, Utah Code Annotated, 1953, and does not constitute making a profit out of the use of public funds or any legal conflict of interest on the part of the plaintiff and does not disqualify him from holding the said office of County Commissoner."

POINT RELIED ON BY APPELLANT

The Court erred in failing to hold that the respondent was disqualified to hold office as Cache County Commissioner because of his contract with said School Board and his announced intention to contract with school districts, and public agencies other than Cache County, while serving on the Board of County Commissioners and by failing to hold that such would constitute a violation of the provisions of Article XIII, Section 8 of the Constitution of the State of Utah, and of Section 76-28-61 and 17-5-10 of the Utah Code Annotated, 1953.

ARGUMENT

Article XIII, Section 8, of the Constitution of the

State of Utah, and Section 76-28-61 of the U
Annotated, 1953, denounce as a criminal offe
making of profit out of public monies by any
officer. Such a violation is a felony and in addi
punishment as a felony any such officer shall
qualified to hold public office. (The constitutiona
ticle is implemented by the Criminal Code pr
76-28-61).

Section 76-28-62 of the Utah Code Annotated,
defines public moneys as including all bonds and
dences of indebtedness and all moneys belonging
State, or to any town, city, county, precinct or dis
therein, and all money, bonds and evidences of in
edness received by State, County, District, Cit
Town or Precinct officers in their official capacity.

A public officer has been defined as "Such o
ficer as is required by law to be elected or appoi
who has a designation of title given him by law, and
exercises functions concerning the public, assigne
him by law." 42 Am. Jur. page 880, Section 2. Se
17-16-2 of the Utah Code Annotated, 1953, enumer
the office of County Commissioner as one of the
officers.

Article I, Section 26, of the Constitution of
specifies that the provisions of the Constitution
mandatory and prohibitory unless by express
they are declared to be otherwise.

[illegible] meaning of the words used in the [illegible] provision and the provision of the criminal prohibiting a public officer making a profit out of [illegible] monies and does not limit the public monies to [illegible] received by such officer in his official capacity. [illegible] constitutional provision is to be given a full, liberal construction of the language therein without any limitation expressed or implied therein a public officer prohibited from making a profit out of public moneys whether he received them in his official capacity or not. The framers of this constitutional article may have meant to limit the making of a profit out of public moneys to those received by such officer by virtue of his public office, but that is not what they said in this provision. The language used is so broad as to include any public officer regardless of the importance or of the governmental level of his office.

Appellant has made an exhaustive research for cases where such a constitutional provision has been construed by the courts, but has failed to find any judicial determination of such provision.

Having found no judicial construction of the meaning of such a provision the appellant has traced the history of similar constitutional provisions and finds that none of the original thirteen states had such a provision in its constitution. The first of such provisions, chronologically, appeared in 1874 in the constitutions

of Arkansas and Pennsylvania, which are as fo

> Pennsylvania 1874. Article IX, Se
> (Profit from use of State Money). Th
> of profit out of the public moneys or us
> same for any purpose not authorized b
> any officer of the State, or member of o
> the General Assembly, shall be a misd
> and shall be punished as provided by
> part of such punishment shall be disqua
> to hold office for not less than five years.
>
> Arkansas 1874. Article XVI, Section
> vate Profit from Public Money). The ma
> a profit out of public moneys, or using, the
> for any purpose not authorized by law, by
> officer of the State, or member or officer
> general assembly, shall be punishable as
> vided by law; but part of such punishmen
> be disqualification to hold office in the Sta
> a period of five years.

It should be noted that the provisions of Ark
and Pennsylvania are general as to the public funds
which the prohibition applies but are specific as to
public officers covered.

The next constitutional provision on this s
appeared in the Missouri State Constitution of 18
reads as follows:

> Missouri 1875. Article 10, Section 1
> ulation in Public Funds). The making of
> out of State, County, City, Town or Scho
> trict money, or using the same for any p
> not authorized by law, by any public officer,
> be deemed a felony and shall be punished as
> vided by law.

[illegible] provision is different in basic con-
[illegible] from the previously mentioned provisions in
[illegible] the public funds including among others
[illegible] funds, but it does not define any specific
[illegible]. It should also be noted that the Missouri
[illegible] the first to make the violation a felony.

[illegible] next such provision is found in the constitution
[illegible] neighboring state of Colorado in 1876 as follows:

> Colorado 1876. Article X, Section 13. (Profiting from Public Money). The making of a profit, directly or indirectly, out of State, County, City, Town or School District money or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

Colorado generally followed the Missouri provision
[illegible] the additional phrase prohibiting the making of a
profit *directly* or *indirectly* out of public money.

Georgia's provision of 1877 reads as follows:

> Georgia 1877. Article VII, Section IX. (Profit on Use of Public Funds). The receiving directly or indirectly, by any officer of the State or County or member or officer of the General Assembly, of any interest, profits or prerequisites arising from the use or loan of public funds in his hands, or monies to be raised through his agency for State or County purposes, shall be deemed a felony, and punishable as may be prescribed by law, a part of which punishment shall be a disqualification from holding office.

This provision is specific at to the public officers

to which it is applicable and defines the funds as ... in his hands or raised through his agency for ... county purposes." This would appear to be t... restrictive language appearing to this time.

In 1879 California passed the following pro...

> California 1879. Article XI, Section ... of Public Funds for Private Use). Th... of a profit out of county, city, town or othe... lic money, or using the same for any purpo... authorized by law, by any officer having th... session or control thereof, shall be a felon... shall be prosecuted and punished as presc... by law.

This provision is along the line of the Georgi... vision in that it defines the funds to which it is a... able as those under the possession or control of the... cer, but it is different in the respect that it does not... tion funds raised through the agency of the officers.

In 1889 the states of Washington, South Da... Wyoming and Montana passed similar constitutio... provisions as follows:

> Washington 1889. XI, Section 14 (Pr... Use of Public Money). The making of profi... of county, city, town or other public mone... using the same for any purpose not auth... by law, by any officer having the posessio... control thereof, shall be a felony, and shall b... secuted and punished as prescribed by law.
>
> South Dakota 1889. Article XI, Sectio... (Use of State Money for Profit). The making... profit, directly or indirectly, out of State, C...

City, Town or School District money, or using the same for any purpose not authorized by law, shall be deemed a felony and shall be punished as provided by law.

Wyoming, 1889. Article XV, Section 8. (Profits from State Funds). The making of profit, directly or indirectly, out of State, County, City Town or school district money or other public funds, or using the same for any purpose not authorized by law, by any public officer shall be deemed a felony, and shall be punished as provided by law.

Montana 1889. Article XII, Section 14. (Depository Board). *** The making of profit out of public moneys, or using the same for any purpose not authorized by law, by the State Treasurer or by any other public officer, shall be deemed a felony, and shall be punished as provided by law and part of such punishment shall be disqualification to hold any public offie.

The Washington provision was apparently taken from the California provision. The South Dakota provision follows the Colorado provision except that it deletes the phrase "by any public officer" and does not define as to whom the limitation applies. The provision of Wyoming is identical to that of Colorado except that it adds the phrase "or other public fund". The Montana provision is general as to the funds to which it applies and is general as to the officers to which it applies but specifically mentions the State Treasurer.

In 1890 the Idaho Constitutional provision followed the Colorado provision except it added "township" mon-

ey to the list of funds involved, as follows:

> Idaho 1890. Article VII, Section 15. Profit from Public Money). The making fit, directly or indirectly, out of State, City, Town, Township or school district or using the same for any purpose not by law, by any public officer, shall be felony and shall be punished as provided

Kentucky in 1891 adopted the following which for all practical purposes is identical to Georgia:

> Kentucky 1891. Section 173: (Officers making profit on public funds guilty of a felony receiving, directly or indirectly, by an the commonwealth, or of any county, town, or member or officer of the General bly, of any interest, profits, or prerequisites ing from the use or loan of public funds hands or moneys to be raised through his for State, City, Town, District or County poses shall be deemed a felony. Said offense be punished as may be prescribed by law, of which punishment shall be disqualified hold office.

The Utah Constitution was passed by the tional convention in 1895; and in 1907 Oklahoma their provision which is substantially the same tucky and Georgia and reads as follows:

> Oklahoma 1907. Article X, Section 1 FIT FROM CUSTODY OF PUBLIC F The receiving, directly or indirectly, by cer of the State, or of any County, City,

... officer of the Legislature of any ... profit or prerequisite arising from the ... of public funds in his hands or moneys ... raised through his agency for state, city, ... district or county purposes, shall be deemed ... Said offense shall be punished as may ... prescribed by law, a part of which punishment ... be disqualification to hold office.

In 1912 the Constitution of New Mexico was adopted and has the following provision:

> New Mexico 1912. Article VIII, Section 4. (Use of Public Money for Private Profit). Any public officer making any profit of public monies or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law, and shall be disqualified to hold public office.

In all there are fourteen states which have constitutional provisions dealing with the making of a private profit out of public money by public officers. Two, Oklahoma and New Mexico, were enacted after the Utah provision and eleven others prior thereto.

The Utah State Constitution was adopted in 1896 with the present Article XIII, Section 8 as follows:

> The making of profit out of public monies, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law, and part of such punishment shall be disqualification to hold public office.

In the proceedings of our Constitutional Convention

mention was made of several state constitutions existence, and it appears that most if not all of stitutions of the various states which had been p adopted were available for the consideration of vention. (*See the Official Report of the Proceed Debates of the Convention Assembled at Salt La on the 4th day of March* 1895 *to adopt a Cons the State of Utah, Volumes I and II.*)

The proposition in question was first brou fore the Utah convention and referred by the com of the whole to the Revenue and Taxation Commit the form of the Idaho provision. (*See Exhibit num pages* 1 *and* 2, *stipulated to and entered on appe*

There is no record existing of discussion wit committee but the provision as it now stands was re ed back to the committee of the whole. (*See Exhibit ber* 1, *pages* 3 *to* 8, *stipulated to and entered on ap*

The provision as recommended by the Commit Revenue and Taxation was adopted by the conve without any discussion or debate on the floor of the vention.

The part of the Idaho provision which reads rectly or indirectly, out of state, county, city, town ship, or school district money" was omnitted Utah's provision and the substitution therefore phrase or wording "the making of profit out of moneys" would appear to broaden the Utah pro

[illegible] to the coverage of the Idaho pro-[illegible] change would seem to indicate that the con-[illegible] concerned that all public money regardless [illegible] to which it belonged would be included in [illegible] prohibition and would not be limited to the agencies [illegible] in the Idaho provision. In view of the fact that [illegible] convention had available to it the constitutional [illegible] provisions of other states specifying certain named of-[illegible], it would appear that the Utah constitutional fa-[illegible] wanted to be certain that all public officers were [illegible] by the prohibition.

The failure of the convention to include in the defin-[illegible] of public funds "any interest, profit, or prerequi-[illegible] arising from the use or loan of public funds in his [illegible] or moneys to be raised through his agency", as [illegible] by several of the other constitutional provi-[illegible], would seem to indicate that the term "public [illegible]" as used in the Utah provision was not limited [illegible] those moneys in the possession or control of the public [illegible] or to those raised through his agency. (See the [illegible] and Kentucky provisions).

Thus it appears that there are three basic elements [illegible] in this type of constitutional prohibitition: (1) [illegible] designation of public moneys covered, (2) the defini-[illegible] of the public officer covered, and (3) the relationship [illegible] the officer and the money. The Utah provision [illegible] all three of these elements in their broadest

form. The definition of "public money" is lac
in the provision to moneys received by any p
agency and would therefore include the funds
and all public agencies. The term "public offic
limited to officers of any certain governmental
is broad enough to cover any person holding
office. Under the Utah provision the only
required between the officer and the funds is
a public officer and that the funds are public
the prohibition applies regardless of his connec
the raising, custody, or expenditure of the money
it would appear that the Utah provision incl
three elements contained in the other constitut
visions in their most inclusive form, whereas
other provision previously and subsequently
by other states, except New Mexico, have words
tation as to at least one or more of the three
ments mentioned above. It would appear that
stitutional convention adopted as the policy
State the proposition that if any man chose to be
officer, he should not profit from any public
regardless of the agency by which they were
whose custody they belonged, or how or by wh
were expended.

Thus in short, it appears to have been the
of the Utah constitutional fathers as reflected by
vision in question, that if a man desired to ser
public officer in any governmental level he

... and all public tills.

... case found by appellant in which any of ... provisions is even cited as a passing ... to the case of NAMPA HIGHWAY DISTRICT ... GRAVES and STRAND, 293 P2d 269 (Ida- ... case was decided on the basis of a statute ... compensation of a highway commissioner to ... provided by the statutes and merely mentioned that ... statute was in conformance with the intent ex- ... in Article VII, Section 10, of the Idaho Con- ... which prohibits any public officer from making ... either directly or indirectly by the use of public ... or using the money of any taxpaying unit of the ... for any purpose not authorized by law. The decis- ... does not in any way endeavor to interpret the mean- ... of the said constitutional provision.

The appellant has searched the copy of the proceedings ... debates of the Idaho Constitutional Convention duly ... to by the Idaho Secretary of State concerning ... VII, Section 10 of the Idaho Constitution, but the ... debates appear to shed little or no light on the intended ... of the provision which was recommended to the ... constitutional convention as a pattern. (*See Exhibit* ... 12, *stipulated to and entered on appeal.*)

It should be noted as herefore pointed out that the ... provisions is very broad as to the plain meaning of ... and such meaning would prohibit the threaten-

ed actions of the respondent. However, if ... should be inclined to interpret judicially and ... scope of the prohibition to something more ... than the plain words cover in order to requir... relationship between the officer and the funds, ... provisions of Section 53-7-10 of the Utah Code An... 1953, may be significant. It is clear by the terms ... section that the funds with which the school boa... ates are raised through the agency of the Com... mission. Even under the most restrictive terms ... Georgia and Kentucky constitutions above cited ... that the money was raised through the agency ... officer making a profit therefrom is sufficient ... stitute a violation of the provision.

CONCLUSION

It would seem to appellant that the respond... not entitled to qualify for the public office of ... County Commissioner because of his present ... contract with another public agency from which he ... receive a profit during his term of office, and ... profit making is expressly declared to disqualify ... from public office under the provision of the Uta... stitution above cited.

It would seem to appellant that the respon... expressed intention to continue the contracting bu... with public agencies expending public moneys dur... term of office would constitute further violatio...

constitutional and statutory provisions and that it should be declared by this Honorable Court that his acceptance in accordance with his expressed intentions would be a violation of the law of the State of Utah and would specifically disqualify him from holding public office.

We therefore respectfully submit that the judgment of the lower court should be reversed.

Respectfully submitted,
Zachary T. Champlin, Cache County Attorney,
David R. Daines, District Attorney for the First Judicial District,
Attorneys for Appellant.